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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, *Respondent*

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Lucy B. Holmes, Independent Executrix, on behalf of the Estate of Harry Holmes, Deceased, hereafter called Respondent, prays the Court to affirm the judgment of the Circuit Court of Appeals for the Fifth Circuit and files herewith her Brief in reply to a Brief heretofore filed herein by the Solicitor General, on behalf of the Commissioner of Internal Revenue, hereafter called "Petitioner."

Opinions Below

The opinion of the Tax Court (R. 11-20) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 39-44) is reported in 148 F. (2d) 740.

Statement

The Statement of Facts in the Brief for the Petitioner is substantially correct, and may be summarized as follows (with slight interpolations):

Harry Holmes, on January 20, 1935, executed the Trusts instrument naming himself as Trustee (with successors) and setting up three equal separate trusts for his three sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes (22, 19 and 14 years of age respectively—R. 3). Under each trust the trustee was directed to use the income therefrom, subject to spendthrift provisions, for the respective beneficiary for fifteen years, at which time such beneficiaries should receive the corpus.

If any son died before the termination of the trust, leaving issue, such issue would receive the income until he reached the age of twenty-one years, when he would receive the corpus.

If any son died before termination of the trust, without issue or leaving issue who died before reaching the age of 21, such trust should enure to the beneficiaries of the other two trusts.

During the trust, the Trustee and his Successor Trustee had the power to use part of the corpus for the benefit of the respective beneficiaries, or to terminate any or all of the trusts prior to the end of the fifteen-year period, and in the event of such termination, the entire trust corpus remaining, would pass to the beneficiaries then entitled to receive it.

Termination of any one trust would put an end to any contingent rights in that trust held by beneficiaries of the other two trusts, and would put an end to any contingent rights of the terminated beneficiary in the other two trusts (R. 36).

Question Presented

Respondent contends that decedent, Holmes, had no power in any capacity, either directly or indirectly, to change the enjoyment of any of his three sons as to the one-third of the corpus or income therefrom originally vested in each of them; that any contingencies involved are trivial and remote, and that any changes of enjoyment, even of contingencies, could result only from Acts of God, unconnected with decedent's power, and not from the exercise of the power itself. Petitioner contends that not only the contingencies but the *entire* trust properties are includible in decedent's estate under Sec. 811 (d) (2) of the INTERNAL REVENUE CODE, because—(a) if any one or more of the three trusts were terminated prior to 15 years, *and* (b) if any of the three sons died *after* the termination and *before* the end of the 15-year period, then the enjoyment of the *survivorship contingencies* might be *different* than if the trust had not been terminated.

The questions are:

1. Was the power of termination the equivalent of a power to *alter, amend* or *revoke* within the wording or meaning of the Act?

2. Were the contingent interests subject to change of enjoyment by the exercise of such power?

3. Were such contingencies too trivial and remote for consideration?

4. If all the first three questions should be resolved in petitioner's favor, would that entitle the Commissioner to include for tax purposes only the value of the contingencies in question, or should the value of the entire trust property—including the vested interests—be included?

Summary of Argument

Each of decedent's three sons had a fee simple title to one-third of the trust corpus and income therefrom subject only to trust management for a maximum of fifteen years, and subject to *living* until the end of the trust management (termination).

Nothing decedent had the power to do could in any way (directly or indirectly) change the enjoyment of this vested right of the first takers—even if the grantor-trustee could withhold every penny of income, the sons would receive their full share with all accumulated income if they lived until the end of the 15-year period or until the trust management was sooner ended. If they lived for the fifteen years, there could be no change of enjoyment to anyone even if the first takers had theretofore received their full share as a result of termination.

This vested estate in the three sons had a definite value at decedent's death over which decedent retained no powers of any description—he could not decrease the basic estate of any son or shift any part of it from one to the other.

However, the Commissioner has sought to include not only the value, if any, of the contingencies hereafter mentioned but is seeking to include for tax purposes the entire trust corpus including the vested interests which have a far greater value than the contingent remainders upon which petitioner's theory of taxation depends.

There are several contingencies which could be terminated under the power and to this extent only, the power of termination might be the equivalent of a power to revoke or alter; but no "change of enjoyment" could occur at the time or be brought about by the termination itself. In fact a contingency can never be enjoyed until the happening of that condition precedent which gives it life and in this case it would be only the happening of such conditions which

could change enjoyment. For example, in the absence of death of a primary beneficiary before the end of fifteen years there would be no change of enjoyment regardless of whether the power had or had not been exercised. Therefore, the contingency, not the power, would change the enjoyment.

Assuming only for the purpose of argument that even a contingency might be "enjoyed" in anticipation, and that a change of such an imaginary enjoyment was within the contemplation of Congress, petitioner must establish that such enjoyment has a value which is more than "trivial" and if it does, then such value is all that may properly be included in decedent's estate for tax purposes—not the value of the entire trust property.

A flight of imagination into the possible contingencies can serve no purpose except to illustrate the triviality of the interest claimed to be taxable—and possibly to furnish a guide to the tax court if this court should think it worth while to remand the case for determination of the value of such contingencies.

It should be noted that Respondent is not relying upon these contingencies and "niceties of conveyancing" to avoid taxation. Petitioner is relying upon them in an effort to impose a tax.

According to the ages of decedent's sons and their life expectancy, the first contingency to their issue would have no value.

If the first takers or any of them died after termination and within fifteen years leaving issue, such issue would probably take as heirs or devisees.

The second contingency or "contingency upon a contingency" was that if the first taker died before termination and within fifteen years and if he left no issue surviving, then the beneficiaries of the other trusts would take under the in-

strument that which they might also have taken as heirs in any event.

The other contingencies start with the first taker dying before termination with issue. If the issue does not live to be 21 years of age, the other beneficiaries of the trust or their issue take his share which they also probably would have inherited.

We submit that the possibility of actual changes in enjoyment, even among contingencies, are more remote and trivial than the contingencies themselves, and that all of the contingencies in question are too trivial and remote to have any value. However, if any value is includible in decedent's estate, it must be restricted to the value of these contingencies.

ARGUMENT

Respondent's First Point

The Trust Indenture involved in this case reserved no power in the grantor either as an individual or as Trustee, which was the equivalent of a power to alter, amend or revoke the trusts. He had only the power as Trustee, to terminate the trusts and thereby accelerate the time when the vested beneficiaries might enjoy the corpus of the trusts which had already been irrevocably given to them in fixed interests by the Trusts Instrument. Any change of enjoyment to contingent interests which might indirectly result, could only affect trivial matters, and could not effect a change in the enjoyment which would be the equivalent of a power to alter, amend or revoke under Sec. 811(d)(2), Act of 1936, or under any prior Act.

Argument

In this case Petitioner seeks to extend to the present fact situation the reasoning used by the Circuit Court of Appeals for the Third Circuit in the case of MELLON v. DRISCOLL, 117 F. (2d) 477, cert. denied 313 U.S. 579; and the reasoning used by the Circuit Court of Appeals for the Second Circuit in the case of COMMISSIONER v. HOFHEIMER, 149 F. (2d) 733.

In the MELLON case, the original Trust only included the income to the two children for life, plus powers of appointment by Will. This Trust contained spendthrift provisions and a power in the Grantor to terminate the Trust. In the event of such a termination, the grant of income for life with powers of appointment over the corpus, would be automatically revoked, and the title to the entire corpus of the estate would thereupon pass in fee simple from the Grantor and Trustee to his children.

In the HOFHEIMER case, the First Trust was one in which the net income was in trust for the benefit of Clara Hofheimer for life, with the principal, at her death, to be distributed to the settlor's children, if living, otherwise to their issue. The Grantor-Trustee there, reserved the power:

> "of terminating this Trust, or from time to time amending its terms in respect to the payment of income to the beneficiary and of imposing any terms and conditions whatsoever in respect to the amount of income thereafter to be paid or the circumstances under which any income shall be payable; and upon the termination of the Trust as aforesaid, the principal of said fund shall be distributed as hereinbefore provided."

In other words, the Grantor-Trustee in that case could at any time amend the Trust and *cancel out* the life estate in

the first taker, and could revoke the income back to himself or give it to others. He could also transfer the corpus, freed of such life estate, to the remaindermen. Certainly, the life estate was subject to revocation or amendment, and there is no question about the life estate being includible. The Circuit Court of Appeals in the HOFHEIMER case, however, went further and held that the remainder interests were also includible under the theory that the power to at any time vest the *then living* remaindermen with complete title would be a power,

> "to change the enjoyment of the remainder interest from an *indefinite* period in the future by remaindermen whose identity and number were not presently known to the immediate present, by individuals who were known." (Italics ours.)

Such change of enjoyment was there held to be more than trivial.

In the case now before the Court, the Petitioner is attempting to apply these holdings to a different fact situation, and we wish to observe here that Petitioner is not seeking to include in decedent's estate for tax purposes simply those contingent remainders which he claims to be subject to change of enjoyment; but the Commissioner has sought and now seeks to include in decedent's estate for tax purposes, the value of the entire Trust properties.

In this case, the Trusts Instrument created for the benefit of decedent's three sons, Harry, John B. and Thomas, three Trusts, each covering an undivided one-third interest in the Trust corpus. If any or all of these three boys lived fifteen years, no power exercisable by either Grantor-Trustee (in any capacity) or any Successor Trustee, could divest, revoke, alter, change, amend or terminate their respective one

third interest in the Trusts corpus or in accumulated income therefrom. Petitioner in his statement of the Question Presented (Petitioner's Brief, p. 2) calls these primary beneficiaries "income beneficiaries" and in his Summary of Argument (Petitioner's Brief, p. 9) calls them "contingently entitled to enjoyment;" but these misleading references to the primary estates created should not detract the Court's attention from the obvious facts that such estates were *vested* and had a *value*—which value should not be included for tax purposes. According to Respondent's petition in The Tax Court (R. 2), Harry Holmes, Jr., was 27 years of age; John B. Holmes was 24 years of age, and Thomas J. Holmes was 19 years of age at the date of decedent's death on October 5, 1940, which would have made them all nearly six years younger at the date the Trusts Indenture was executed.

These ages were not contested in The Tax Court. In fact Petitioner's principal contention at that time was that the entire corpus was includible on the theory that the 1936 Amendment was "strictly declaratory" of prior law and that a power of *any type* of termination was within the language of the Act prior to 1936, and that "termination" meant the same thing as "revoke." The Commissioner in taking such position was relying upon that part of TREASURY REGULATIONS 105, Sec. 81.20, which reads as follows:

> "The Third change * * * consists of the addition of the words 'or terminate' following the words 'to alter, amend, revoke.' Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment." (Appendix, infra p. 31.)

The Commissioner in taking that position was ignoring the

language of the Regulation, which immediately followed that above quoted, and which is as follows:

> "A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is to that extent, the equivalent of a power to 'revoke,' and when otherwise so exercisable as to effect a change in the enjoyment is the equivalent of a power to 'alter.'" (App., infra p. 52.)

It was only after the appeal to the Circuit Court, that the Commissioner seriously contended that the power of termination in this trust actually was the equivalent of a power to "revoke" or "alter" because of the possibility of a change of enjoyment in the contingencies.

The facts alleged by Respondent before The Tax Court, bearing on the ages of the primary beneficiaries may be presumed to have been found by The Tax Court in accordance with its Judgment (DOBSON v. COMMISSIONER, 320 U.S. 489, 64 S. Ct. 239); and the Courts may give judicial notice to recognized Mortality Tables. (20 AMERICAN JURISPRUDENCE 113, Sec. 99.) According to the recognized Mortality Tables, each of these three boys had a life expectancy of more than twice as long as fifteen years, both from the date of the execution of the Trust Instrument, and from the date of decedent's death. The possibility that they would not live out their expectancy had no value, either actual or recognizable at law, at either time. Any contingencies, therefore, based upon the possibility of their failure to live for fifteen years, would certainly be too *trivial* for consideration by this Court. DORT v. HELVERING, 69 F. (2d) 836; MELLON v. DRISCOLL, 117 F. (2d) 477, cert. denied, 313 U.S. 579; COMMISSIONER v. HOFHEIMER'S ESTATE, 149 F.

(2d) 733. This, however, is not the extent of the triviality of the contingencies upon which Petitioner bases his case. Even if any of the three sons should die, after termination and within the fifteen-year period, leaving issue surviving, such issue would in all probability enjoy the property as "heir," the same as if he had received it as "issue" under the trust.

In fact it is difficult to imagine how and in what manner a "contingent" interest may be *enjoyed* at all prior to the happening of its condition precedent as mentioned in petitioner's brief (Note 3, page 14). Following that language further, a contingency may be "vested" at law subject to "complete defeasance"—in fact it never ripens into enjoyment until the occurrence of that condition precedent necessary to give it life.

Until an estate ripens into enjoyment, its enjoyment may not be *changed*—except possibly in contemplation or wishful thinking. If any of the contingencies in this case had occurred prior to the exercise of the power, the power could not *change the enjoyment* of the vested estate— it would no longer be contingent.

The court in the HOFHEIMER case spoke of "contingent remainders" but in fact those were *vested remainders* of the corpus in children and issue—following a *full life* estate. Exercise of the power cut out all *vested* remainders in favor of one particular one. Exercise of the power in the HOLMES case only cut off contingent interests which up until that time had not matured, and in all probability never would have come into enjoyment in any event.

The interest, therefore, which Petitioner claims to be subject to change is so completely trivial and remote as to be not only beyond the possibility of valuation, but beyond any reasonable contemplation, either by the Court or by the decedent at any time he might have exercised the power.

These sons had a vested interest in their respective one-third shares of the corpus, subject only to remote and unlikely contingencies. The primary beneficiaries in the MELLON case, on the other hand, never had anything except a right to income for life in the event the Grantor chose to let them have it. In this connection the spendthrift provisions, together with other powers, in the Mellon Trust could, at the election of the Grantor, prevent his children from ever personally receiving any of the income or corpus of the Trust. The power reserved by the Grantor in the MELLON case was, therefore, the power to revoke that interest which in his discretion might amount to nothing so far as the first takers were concerned, and to transfer to those first takers a complete fee simple title which had remained in Grantor and which they could never have received under the Trusts Instrument and which (since the Grantor's death without the exercise of power) they will never receive so long as they live. There were *no* contingent remainders involved in the MELLON case.

In the HOFHEIMER case, the ultimate enjoyment of the remainders under the Trust Indenture were subject to a preceding life estate which might have lasted one year or seventy-five years. The fact that it was necessary to their enjoyment that the remaindermen be alive at the end of an "indefinite" period (the end of the life estate), was the thing seized upon by the Circuit Court of Appeals in deciding that the possibility of changes in enjoyment in that case could not "be regarded as being trivial." Certainly, remaindermen could be and very probably would be different if the preceding life estate should (as it very likely might) extend over a long period of time. These were *vested* remainders which the exercise of the power would revoke in favor of persons who otherwise had only a contingent right depending upon their outliving the life tenant.

In the case now before the Court, there was nothing "indefinite" as to the time when the full title would pass. If the primary beneficiaries were alive at the end of fifteen years (as they were likely to be) no power exercisable by the Grantor-Trustee in any capacity, could prevent their complete enjoyment in accordance with the original instrument, not only of their full one-third interest of the corpus but also as to all accumulated income, if any, which had been withheld under the spendthrift provision. That the primary beneficiaries would themselves be living at the end of fifteen years was not a "contingency" nor a "possibility"—it was a distinct probability according to the only human means of calculating the extent of life, or the time of death; that is, the Mortality Table. There were further distinct probabilities that even if any of the sons should die, after termination and within fifteen years, his surviving issue would be his heirs or devisees.

Petitioner has, for the first time in this Court, laid particular emphasis on the spendthrift provisions entitling the Trustee to withhold income and to those provisions empowering the Trustee to use part of the corpus in either of the Trusts for the welfare, happiness, etc., of the beneficiary of that particular Trust. These points were not particularly pressed or urged either in The Tax Court or in the Circuit Court of Appeals, and were not listed under the "Question Presented," "Statement of Points to Be Urged," or "Summary of Argument" in the Petition for Writ of Certiorari. In fact, we do not believe that the Trustee's power to "invade" the corpus for the beneficiaries (not for himself) has ever been raised before. We doubt, therefore, that these points should now be considered in this case by this Honorable Court. SONZINSKY v. UNITED STATES, 300 U.S. 506, 81 L. Ed. 772, 57 Sup. Ct. 554; OWENS v. UNION PAC. R. CO., 319 U.S. 715, 87 L. Ed. 1683, 63 Sup. Ct. 1271.

A holding in this case that spendthrift provisions would invalidate this Trust for tax purposes would cast a cloud upon the validity of every Trust containing spendthrift provisions.

Suffice to say that the spendthrift provisions in this instrument gave the Grantor-Trustee no greater power than he had with reference to the corpus—although he might withhold income, he could not divert it from the particular Trust to which it accrued, and he could not prevent the ultimate enjoyment of it by the beneficiary—subject only to those remote and unlikely contingencies, based on life or death of others than decedent. The spendthrift provisions in the MELLON case, supra, applied to beneficiaries who had no more than a life estate in income to start with and might have deprived them of that.

The power of the Trustee to "invade the corpus" is little different in legal effect than is the power of termination—in either case the beneficiary would receive part (or all) of the corpus prior to the end of the maximum term provided in the Trusts Instrument.

The power of termination in this case was not a power which could affect any of the rights of the first takers, Harry, John B., and Thomas, to their respective one-third interest in the corpus or the income therefrom; and we submit that in any event, the value of these interests should not be included in decedent's estate. If any contingency is subject to change of enjoyment as contended by Petitioner, then only the *value* of such contingencies are includible. COMMISSIONER v. BRIDGEPORT CITY TRUST CO., 124 F. (2d) 48, certiorari denied, 316 U.S. 672; TAIT v. SAFE DEPOSIT & TRUST CO., 74 F. (2d) 851. See Annotation, 139 A.L.R. 555.

Respondent's Second Point

Even if the possibility of change of enjoyment in the remote contingencies were not too trivial for consideration by the Court, such changes of enjoyment could not be brought about by the exercise of the powers held by Grantor-Trustee, but could be brought about only by Acts of God (death) occurring after any exercise of the power, entirely beyond decedent's control, and which he could not anticipate at any time he might exercise the power. Such changes of enjoyment brought about by the subsequent death of beneficiaries could not be said to have happened as a result of any act of volition by the Trustee, and could not be among those powers of control which Congress intended to penalize.

Argument

Petitioner's entire position in this case is based upon the claim that the Trusts Instrument, by reason of its survivorship provisions, created contingencies, the enjoyment of which might be changed by the happening of such contingencies after the exercise of the power of termination, but before the end of the maximum Trust period originally provided. As heretofore pointed out, Petitioner has not sought to tax these contingencies or have them valued for the purposes of including them in decedent's estate. In fact, an attempt to do so would hardly be worth while as they have no value, either actual or within the contemplation of the law. There is, however, another apparent fallacy in Petitioner's position. The possibilities of changes of enjoyment in these contingencies depend not upon the exercise of the power, but upon Acts of God occurring after the exercise of the power, and prior to the end of the trust period origi-

nally provided. In other words, the exercise of the power to terminate does not *itself* bring about any change of enjoyment, even in the contingencies, because any of such contingencies which occurred prior to the exercise of the power, would be binding upon the Trustee on his termination—the estate would pass to the contingent remaindermen; and the Trustee, at any time he exercised the power, could not know, control, or even guess whether any of the contingencies provided in the original instrument would thereafter occur, or not. In fact, Petitioner's position would be just as valid as it now is, even if there were no survivorship contingencies provided in the Trust, because the simple, common, ordinary provisions for the management and control of Trusts might result in a similar change of enjoyment, even if the beneficiary had simply been "John Doe or his heirs." Any act of any ordinary Trustee might, under this theory, have the indirect effect of changing the enjoyment as between the first taker and his heirs.

In other words, the undeniable effect of Petitioner's argument is that any power of termination in any Trust (even though executed prior to the 1936 Amendment), regardless of the meaning of the power of termination, regardless of its effect, and regardless of the infinitesimal interest or possibility of interest affected thereby, would make the entire Trust corpus includible in decedent's estate for tax purposes.

Petitioner admits this in effect at page 17 of Petitioner's Brief in this Court, Note 5, where Petitioner states:

> "It is difficult, moreover, to envisage a situation involving only acceleration and without any other changes in enjoyment."

Under Petitioner's argument there certainly could be no case of an acceleration without a change of enjoyment.

In this case, the Trustee, at any time he might have exercised the power of termination, could not know or even guess which of the beneficiaries might possibly thereafter die, and, therefore, the Trustee could not contemplate whether the terminated beneficiary would be hurt by eliminating his contingent interest in the other two trusts, or whether the beneficiaries in the other two trusts would be hurt by eliminating their contingencies in the terminated trust. Likewise, the Trustee could not know or even contemplate which of the beneficiaries might possibly be benefited by a death subsequent to the exercise of the power.

In the same manner, if the Trusts had been for the benefit of the three sons and "their heirs" without any survivorship provisions, the Trustee, at any time he might have exercised the power, could not have anticipated whether the primary estate would be "appointed by Will," spent, or increased by diligent investments, by the first taker; and therefore, the Trustee could not know or contemplate whether those persons who might have been the "heirs" at the end of the maximum term of the original trust would take more or less in case the first taker had previously died.

The fact is that Petitioner has by technical argument and imaginary hypothesis again arrived at his original position before The Tax Court to the effect that the Act, prior to the 1936 Amendment, meant exactly the same thing as the Act applicable after the 1936 Amendment, and that under the Act applicable prior to 1936, there could be no termination of any kind without effecting a change of enjoyment. The mere fact that Congress made one section of the Act applicable to trusts executed before the date specified in the Act, and another section applicable to trusts executed thereafter, would indicate that Congress had an intent and purpose to make some distinction, and to exempt from taxa-

tion properties subject to some types of trusts which could be terminated by the decedent.

We submit that the Congressional intent must be recognized by this Court if that intent may be determined by reasonable inference from the Act; that the theory of Petitioner is too technical and based too much upon imaginary hypothesis to warrant serious consideration by the Court; that the reasonable Congressional intent can be inferred from the Act; that one reasonable inference is that under the section of the Act applicable prior to the date specified therein, property would not be includible unless (in the wording of the Act) "the enjoyment thereof was subject at the date of his death to any change (actually brought about) through the exercise of a power * * * to alter, amend or revoke." (Parenthetical matter inserted); that another reasonable inference is that Congress did not intend to include powers of termination where any change of enjoyment resulting from Acts of God occurred after the exercise of the power, could not be said to have been the result of any *volition or control* by the decedent.

We doubt if the records of the Ways and Means Committee with reference to the advisability of adding the word "terminate" (quoted in Petitioner's brief at page 26) could be considered as indicative of the Congressional intent at the time the PRIOR act was passed. Such records might indicate that Congress intended the word "terminate" as added in the new act to be considered only as the equivalent of "revoke"; but that question is not before the Court in this case and we mention it only in answer to Petitioner's argument as to the meaning of the record. Certainly there is nothing in the legislative history indicating a Congressional feeling that the word "terminate" should be read into the prior act except insofar as termination might in any particular case be the equivalent of revocation.

These purposes of Congress would have been strictly in accordance with the general intent and purpose of the Act taxing estates *owned* by decedents at the time of their death, or over which such decedents exercised a control involving substantial incidents of ownership.

Where the Decedent could not even anticipate how, or in whose favor, or in what manner a change of enjoyment might come about as a result of the subsequent death of other parties, it certainly could not be said that the power contained any of the ordinary incidents of ownership or control.

The word "terminate" does not have the same meaning as the word "revoke" as applied in the case of MELLON, ET AL., v. DRISCOLL, supra.

The Commissioner, through all the history of this case, has claimed that the word "terminate," as added to the phrase "alter, amend, or revoke," in the 1936 Act, had the same meaning as the word "revoke," and was nothing more than declaratory of the word "revoke." The Commissioner then claims that this brings the HOLMES case within the rule of MELLON v. DRISCOLL, supra.

We do not understand the Court in the MELLON case, to say these two words have the same meaning, for, clearly, they do not. This is what JUDGE BLACK clearly understood, when in the decision in the HOLMES case he said:

> "If the word 'terminate' is understood to have the meaning that the Court gave it in Mellon v. Driscoll, then we agree that it is embraced by the word 'revoke' as the statute existed prior to its amendment in the 1936 Act, passed June 22, 1936" (R. 16).

WEBSTER'S NEW INTERNATIONAL DICTIONARY, Second Edition, Unabridged:

REVOKE: To recall. To annul by recalling or taking back; to repeal; to take back; to reassume; to recover; to draw back. To restore to use or operation.

TERMINATE: To put an end to; to make to cease; to end. To come to a limit in time; to end; close; to have its end; final part, or outcome.

WORDS AND PHRASES:

REVOKE: Revoke means to annul or make void by recalling or taking back, cancel, rescind, repeal, reverse. Revoke means to recall, take back or to repeal.

Very clearly revocation terminates a trust, but just as clearly "terminate" as provided in the Holmes Trust, bears no relation or resemblance to revocation and only terminates the *trust*, not the vested interests of the beneficiaries.

Thus, "revoke" in the MELLON case, if the right were exercised by Mellon, would have meant, beyond any doubt whatever, that the Mellon children would have received the corpus of the trusts and this corpus was not by any stretch of the imagination, granted to them in the Trust Instrument. It would have been "a change in the amounts they are to take." (See HASSETT v. WELCH, 303 U.S. 303.)

In the HOLMES case, all of the corpus of the property and the income therefrom, were by the Trusts Instrument irrevocably vested in the three beneficiaries in three divided and equal interests, and if Holmes, either as grantor or as trustee, had exercised the right to terminate the trust, he could only have terminated his rights of trust management and advanced the time of enjoyment. He could make no change in the amounts they were to take; but could only change *when* they were to take it. ESTATE OF OSCAR H. PERRIN, ET AL., EX-

ECUTORS, v. COMMISSIONER, Dec. 13,806 (M) C.C.H., Dkt. #580, U. S. Tax Ct., Memorandum Opinion March 13, 1944, Treasury Regulations 108, Sec. 86.3.

We do not believe, therefore, the Commissioner can stretch the word "terminate" in the HOLMES case to mean "revoke" or that the HOLMES case comes within the rule in the MELLON case.

Respondent's Third Point

A power of termination which was merely the equivalent of a power to accelerate the time of enjoyment by beneficiaries holding vested interests was not the equivalent of a power to alter, amend or revoke.

Argument

As pointed out in the argument under Respondent's First and Second Points, Congress must have considered the word "terminate" to have *some* meaning other than alter, amend or revoke, or Congress would not have re-enacted the subsection applicable to transfers on or prior to June 22, 1936.

In accordance with the language of TREASURY REGULATION 105, Sec. 81.20, any power of termination would be permissible unless it was the equivalent of a power to alter, amend or revoke.

In ordinary usage "termination" when applied to trusts would mean to bring to an end the powers of the trustee s that the beneficiaries would thereafter own their beneficial interests unburdened with the trust. Both the Circuit Court of Appeals and The Tax Court called this an acceleration of the time of enjoyment and held that it was not the equivalent of a power to alter, amend or revoke.

Such holding was not in conflict with any authority whatsoever and no conflicting authority has ever been cited by Petitioner. On the contrary the reasoning of the Court below

is sustained by Treasury Regulations and respectable authority.

TREASURY REGULATIONS 108, Section 86.3, reads:

> *"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof.* Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift." (Italics ours.)

ESTATE OF OSCAR H. PERRIN, ET AL., EXECUTORS, v. COMMISSIONER, Dec. 13,806 (M) C.C.H., Dkt. No. 580, U. S. Tax Ct., Memorandum Opinion March 13, 1944. Because of the similarity of this case to the case at bar, we quote from the decision of The Tax Court:

> *"Estate tax—No power to change proportionate shares payable to trust beneficiaries.*—The value of a trust, created in 1935, for the education of two grandchildren, providing for the payment of amounts of income and principal not exceeding a stipulated maximum during the course of their college career, or if they should not go to college, during four years, and *then so much as necessary for their support and maintenance until they reach the age of thirty when* the balance should be paid over to them, equality to be maintained between them, *Held*, not includible in the estate of the settler-Trustee. A power to alter, amend, or revoke the enjoyment of the trust was not retained by the settler-Trustee. (Italics ours.)
>
> *"Estate tax—No power to change total share payable*

to trust beneficiary. The value of a trust, created in 1937, for the education of a third grandchild, payments to be made as in the case of the above trust in favor of the two grandchildren, and upon her reaching the age of thirty the balance to be paid to her, *held*, not includible in the estate of the settler-Trustee, in the absence of a reservation by the settler-Trustee of the power to change the enjoyment of the trust."

This case, though very similar to the case at bar, was acquiesced in by the Commissioner. Here the settler-trustee could vary the time of enjoyment until the beneficiaries reached 30 years of age, and if they failed to live the 30 years such variation might deprive them of personal enjoyment of part of the trust property.

In the case at bar, Holmes, by reserving the right to terminate the trusts as trustee, could as to primary shares to the sons only advance the date of enjoyment by the beneficiaries of the exact part of the trusts which would surely and certainly go to each beneficiary as fixed in the Indenture.

The gift tax and the estate tax are closely related. SANFORD'S ESTATE v. COMMISSIONER, 308 U.S. 39; HIGGINS v. COMMISSIONER, 129 Fed. (2d) 237, cert. denied, 63 S. Ct. 57. A case construing the gift tax will not necessarily control in an estate tax case; but the construction of trusts and the title passing thereunder are common to both.

Respondent's Fourth Point

The decision of the Circuit Court of Appeals was not based either upon the fact that decedent could not revest himself with title, or upon the theory that the Trusts Instrument itself gave the decedent as Trustee, the power to change enjoyment. On the contrary, the Circuit Court of Appeals held that the de-

cedent in this case would not have the power under the instrument, to change the enjoyment of any interest held by the beneficiaries, and would not have the power to alter the benefits received by them.

Argument

We do not contend, as inferred by petitioner at page 18 of his brief, that this Honorable Court erred in the case of PORTER v. COMMISSIONER, 288 U.S. 436. Neither do we contend that the Treasury Regulation quoted by Petitioner at page 27 of his brief (Sec. 81.20, TREASURY REGULATIONS 105—App., infra p. 31) is necessarily in error. In fact, the Circuit Court of Appeals in its decision below, was simply paraphrasing the Treasury Regulation upon which Petitioner relies in using the language which Petitioner now says casts the Circuit Court in conflict with the decision of this Honorable Court in PORTER v. COMMISSIONER, supra. The language quoted by the Circuit Court from the Treasury Regulation is as follows:

> "A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property, or an interest therein or as otherwise, to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke.' * * * "

The language of the Circuit Court of Appeals, which immediately follows quotations by the Court of the Regulation and which language Petitioner claims was in conflict with PORTER v. COMMISSIONER, supra, is as follows:

> "The power to terminate was not capable of being so exercised as to revest in the decedent any legal or beneficial title to any interest in the Trust property,

nor could it operate to empower the decedent to choose different beneficiaries from those named, *or to alter the benefits received by them*" (R. 42). (Italics ours.)

If the Court omitted part of the Treasury Regulation, such omission was supplied in the Court's holding above quoted.

To make it clearer, we reiterate, we are not relying solely upon the fact that decedent could not "recapture" any interest in the property—the fact that he could not, is certainly an element which may be mentioned in the development of any opinion by the Court or any discussion of this case (as it was stated in the Regulation itself) without convicting the Court of contending that if decedent reserved no such power, he might reserve any other type of power prohibited by statute. In fact, the Circuit Court of Appeals in its Opinion specifically recognizes the holding of this Court in PORTER v. COMMISSIONER, supra; and in the same sentence where it was observed that decedent reserved no power to revest in himself any interest in the trust property (within the language of the Treasury Regulation) the Circuit Court of Appeals went on to say that in its opinion, decedent likewise did not reserve the power to "choose different beneficiaries from those named, or to alter the benefits received by them."

At pages 18 and 19 of his brief Petitioner also infers that the Circuit Court of Appeals, in its decision, relied upon a theory that it would be permissible for the decedent to reserve a power to change or alter the enjoyment of any interest created in the Instrument. We submit that the Circuit Court of Appeals made no such holding, but on the contrary, specifically held that in its opinion, the decedent in this case would not have the power "to alter the benefits received by them (beneficiaries)." (Parenthetical matter interpolated.) (R. 42.) All of the cases cited by petitioner at

pages 18 and 19 of his brief hold that decedent cannot under the statute reserve the power to change beneficiaries or to alter the amounts they are to receive. We do not contend that these decisions are in error and neither of the Courts below so held.

We cannot refrain from suggesting that a serious mistake has been made in attributing to the Circuit Court of Appeals definite holdings which it did not make, and that such mistake should be corrected by this Honorable Court.

Respondent's Fifth Point

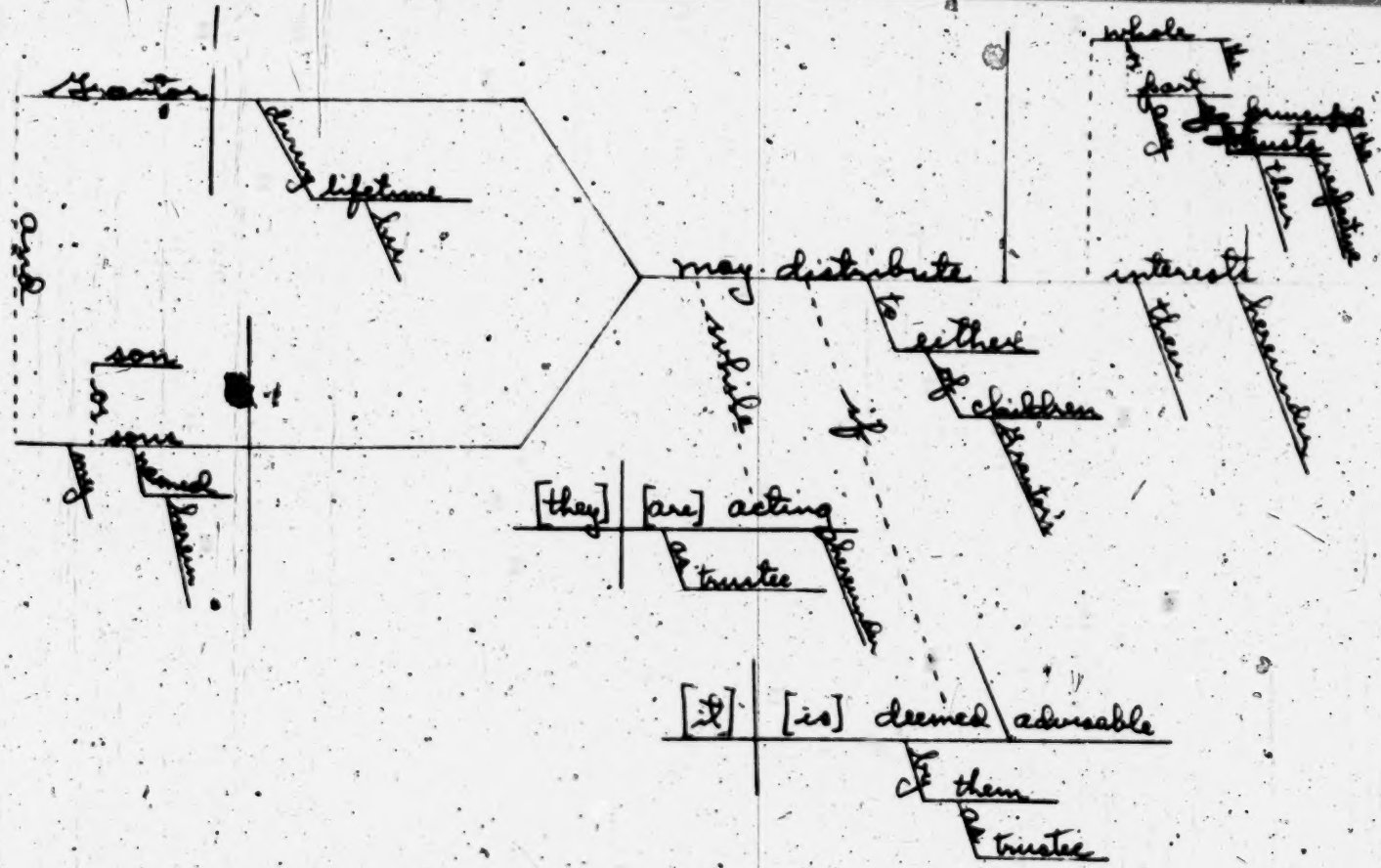
While decedent had no power to alter, amend or revoke in *any* capacity, he had legal obligations and responsibilities to the beneficiaries as trustee which he did not have as grantor and this should be given consideration.

Argument

As indicated by Petitioner, we contended in the Circuit Court of Appeals that decedent's powers in the trust were exercisable by him only as trustee. A Trustee has definite legal and equitable responsibilities to the beneficiaries of a trust which even a father does not have individually to his children. For that reason, we do not think that it *must* be inferred as Congressional intent to include within powers reserved to a "decedent" (within the meaning of the Act applicable prior to the 1936 Amendment) those powers exercisable by him only in his capacity as Trustee.

Powers held by decedent only as trustee cannot pass by inheritance or devise within the generally accepted purpose of the tax assessed against *estates of decedents*. Such powers pass under the original instrument to Successor Trustees.

Therefore, we submit herewith our Exhibit "A" which is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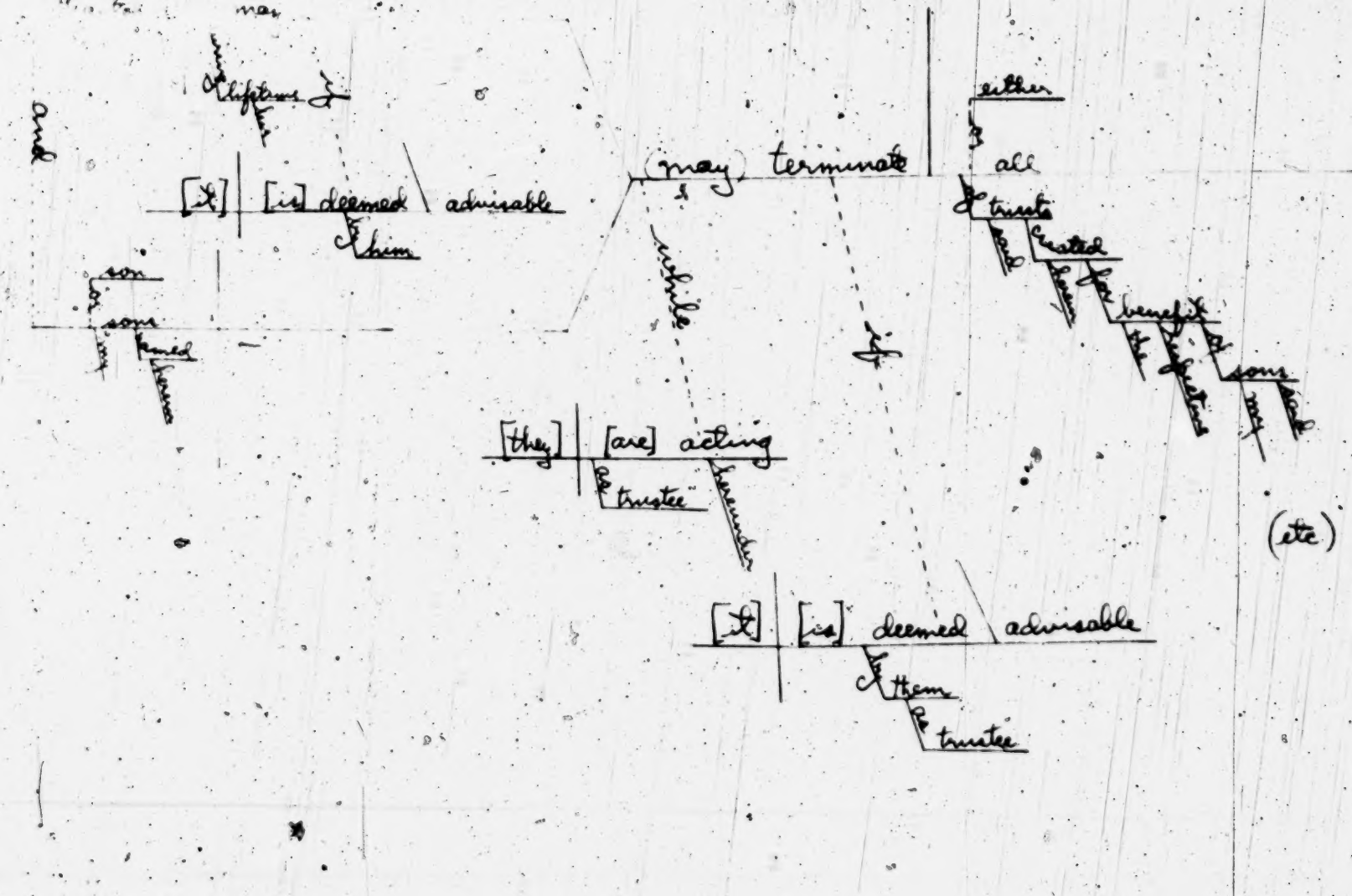
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a correct grammatical diagram of the power of partial distribution and our Exhibit "B" which is a correct grammatical diagram of the power of termination. We believe that the only power here was one which did not pass by death of Holmes, and which (prior to 1936), Congress did not intend to tax.

Certainly, the language "in any capacity" was not inserted in the Act until 1936 and it is well settled that in case of doubt a taxing act will be construed in favor of the taxpayer. HASSETT v. WELCH, 303 U.S. 303.

We are certain, however, that the case does not necessarily turn on this point, for as heretofore stated, the decedent here did not have the prohibited powers in any capacity.

Conclusion

It is submitted in conclusion that the decedent's intention, as expressed from the entire instrument, was to make irrevocable gifts for the benefit of his three sons and that the only purpose of the power of termination was to permit them to receive their gifts prior to the end of the fifteen years provided by the Trusts Instrument.

We submit further that this power, at least to the extent of the primary estates vested in the three sons, was certainly not the equivalent of a power to alter, amend or revoke their rights. If any part of the trust properties was taxable, certainly the value of these primary interests should not be included, and the case, if reversed, should be remanded for determination of the value of the contingent interests claimed to be subject to change of enjoyment.

Respondent submits, however, that even the contingent interests, relied upon by Petitioner, are not properly includible in decedent's estate for two reasons:

First, they are too remote and trivial, and

Second, any change of enjoyment in the contingencies could not be brought about by the exercise of the power, but only through the happening of remote and improbable contingencies over which decedent had no control and could not have anticipated at any time he exercised the power.

All of the contingent interests which Petitioner claims were subject to change of enjoyment, were very obviously included in the instrument not to continue decedent's control over the property, within the meaning of the Act, but simply to provide that in almost every reasonable contingency the trust property would be enjoyed by decedent's sons, their issue, or their decedents.

The power of termination likewise was not a continuation of decedent's control within the meaning of the Act. He had *given* the property subject only to trust management for fifteen years. The power of termination was not designed to permit alteration, amendment or revocation of the beneficiaries' rights, but rather so that the Trustee could *release* the full title to the primary beneficiaries before the expiration of the fifteen-year trust period; thus, advancing the time of enjoyment.

In other words, the Trustee had the right under the instrument to continue his trust management for the maximum term. The law permitted such a trust, and it was no violation of either the spirit or the letter of the Act for the Trustee to have the power to release the powers of trust management at an earlier date if any of the primary beneficiaries matured sufficiently to properly manage his own property.

It is certain from the instrument itself that the decedent in providing this power of termination in the Trustee and

Successor Trustee, was thinking only of the primary beneficiaries, for their issue would not even be of legal age within the fifteen-year period—much less mature enough to manage extensive properties.

WHEREFORE, Respondent submits that the decision below should be in all things affirmed; but in the alternative, if it should be determined that any of the remote contingent interests are includible and have a value sufficient to justify inclusion in decedent's gross estate, the case should be remanded to The Tax Court for determination of the value of such contingent interests.

Respectfully submitted,

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Attorneys for Respondent,
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Appendix.

INTERNAL REVENUE CODE:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, whether situated, except real property situated outside of the United States—

* * *

(d) *Revocable transfers*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under Para-

graph (1) unless it is includible under this paragraph; (26 U. S. C., Sec. 811.)

* * *

TREASURY REGULATION 105, promulgated under the estate tax provisions of the Internal Revenue Code:

Sec. 81.15 *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * *. (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see Sections 81.20 and 81.21).

* * *

Sec. 81.20. *Transfers with power to change the enjoyment.*—(a) Transfers included.—Subsection (d) of Section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See Section 81.15.)

The addition to Subdivision (d) (1) of the Revenue Act of 1926, by Section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied

in Subsection (d) (1) of Section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in Section 811 (d) (1) of the Internal Revenue Code) namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

Treasury Regulations 108, promulgated under the gift tax provisions of the INTERNAL REVENUE CODE:

Section 86.3

* * *

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

* * *